

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

KIMBERLY BAILEY,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 00-CR-01242-JM  
CIVIL NO. 00-CV-00155-JM

ORDER DENYING MOTION  
TO VACATE, SET ASIDE, OR  
CORRECT SENTENCE PURSUANT  
TO 28 U.S.C. 2255

Movant Kimberly Bailey (“Bailey”) moves to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. §2255 (“Motion”). Respondent United States of America opposes the motion. Pursuant to Local Rule 7.1(d)(1), this matter is appropriate for decision without oral argument. For the reasons set forth below, the Motion is denied in its entirety. The Clerk of Court is instructed to close the file.

**BACKGROUND**

**Pretrial Proceedings**

In April 2000, a federal grand jury returned a superseding indictment charging Bailey with conspiring to kidnap, murder and maim a person in a foreign country in violation of 18 U.S.C. §956(a)(1) (Count 1), kidnaping in violation of 18 U.S.C. §1201(a)(1) (Count 2), and murder for hire in violation of 18 U.S.C. §1958(a)(Count 5). At the time of indictment, Bailey was represented by attorney James Warner. In July 2001, the United States filed under seal an ex parte motion regarding a potential conflict between Bailey and Mr. Warner. Ultimately,

1 by September 2001, Mr. Warner withdrew as counsel of record and Bailey retained Philip  
2 DeMassa as her counsel.

3 On October 17, 2001 codefendant John Krueger pleaded guilty to a second superseding  
4 information charging him with conspiracy to kidnap a person in a foreign country in violation  
5 of 18 U.S.C. §956(a)(1). The plea agreement included a cooperation provision.

6 The court granted several continuances in order to allow Bailey and her counsel to  
7 adequately prepare for trial and to resolve pretrial motions. Trial commenced on June 18, 2002  
8 and, on July 15, 2002, the jury convicted Bailey of all three crimes. The jury did not reach a  
9 unanimous decision on whether or not the victim, Richard Post, had been murdered. On  
10 August 27, 2003, Bailey was sentenced to life imprisonment on Counts 1 and 2, to run  
11 concurrently, and ten years imprisonment on Count 5, to run concurrent with Counts 1 and 2.

#### 12 **Overview of the Government's Case**

13 The United States called about ten witnesses, including undercover FBI Agent Nicholas  
14 McKean, Svetlana Ogorodnikova, co-defendant John Krueger, and several of victim Richard  
15 Post's children and friends. The United States also played for the jury the entire video and  
16 audio tape of the transaction whereby Bailey paid the undercover FBI agent \$10,000 cash to  
17 have codefendant Krueger and others killed. The Government also played portions of audio  
18 tapes in which Bailey told Svetlana Ogorodnikova that she paid thousands of dollars to have  
19 Richard Post kidnaped and killed in Mexico and described how it was carried out.

#### 20 **Overview of Bailey's Case**

21 The defense vigorously cross-examined all of the government's witnesses, especially  
22 Svetlana Ogorodnikova and John Krueger. The defense also called approximately 18  
23 witnesses in its case-in-chief, including Bruce Perlowin, Sandra Armendariz, Ben Harroll,  
24 Randy Binter, Dr. Bruce Shelton, and Jay Walker. Through these witnesses, Bailey  
25 significantly impeached Svetlana Ogorodnikova and co-defendant John Krueger. Bailey also  
26 sought to show that she did not cause the victim Richard Post to disappear and that Post,  
27 Ogorodnikova, Perlowin, and others were attempting to poison her.

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1 **The Evidence at Trial**

2 Viewing the evidence in the best light for the Government, in late 1997 Bailey  
3 employed Intellisource, an investigative firm owned and operated by Richard Post, to  
4 investigate the loss of money she invested in Canada. TR 542. By way of background, Bailey  
5 owned a business that sold “black boxes” which reportedly cured various illnesses, including  
6 cancer. In 1998 Bailey and Post became romantically involved. TR 393.

7 In August of 1998, John Krueger, one of Post’s employees, was in charge of managing  
8 Bailey’s business. At about that time, Krueger informed Bailey that Post was embezzling  
9 money from her and had commenced a romantic relationship with another woman. TR 396.  
10 Upon hearing that Post was both embezzling money and cheating on her, Bailey became  
11 emotionally upset and asked Krueger to contact his friend, Humberto Iribe, to arrange to  
12 kidnap Post. TR 549. Krueger and Bailey developed a plan to get even with Post for the  
13 unfair way they felt he was treating them and to recover money he supposedly stole from  
14 Bailey. It was understood that Post would have to be hurt in order to persuade him to tell  
15 Bailey what she wanted to know. TR 552. On the same day, Krueger contacted Iribe who  
16 informed Krueger that the kidnaping would cost \$50,000.

17 In mid-August 1998, Bailey and Krueger met with Iribe at Horton Plaza, a shopping  
18 center in San Diego, California, to discuss the kidnaping plans. At that meeting, Krueger  
19 excused himself and left Bailey and Iribe alone for about one hour in order to discuss the  
20 details of the kidnaping scheme. TR 555-56. Once the meeting was over, all three walked  
21 back to their parked cars and Iribe informed Krueger and Bailey that he needed \$2,000 to  
22 purchase scrambled radios and stolen cars in order to carry out the kidnaping in Mexico. TR  
23 558.

24 Following the meeting, Bailey told Krueger about the basic details of the plan. Bailey  
25 was responsible for the \$50,000 payment as well as luring Post to Mexico, because Iribe would  
26 not kidnap Post in San Diego. In order to carry out the plan, on August 20, 1998, Bailey  
27 arrived at Post’s office and traveled with him to Tijuana, Mexico. Later that day, Krueger  
28 received a phone call from Bailey stating that the kidnaping had taken place in Tijuana, in front

1 of a pharmacy. TR 568. Krueger then spoke with Iribé who asked him to come to Tijuana  
2 because there was a problem with the money. TR 570. On the same day, Iribé told both  
3 Bailey and Krueger that he would beat up Post in order to get him to tell where the money was  
4 hidden. TR 574-75. Krueger also represented to Iribé that the \$10,000 payment shortfall  
5 would be taken care of within twenty four hours. TR 576.

6 Bailey, Krueger, and Iribé also discussed an alibi for Bailey because she had been the  
7 last person seen with Post. TR 578. They created a plan whereby they would force Post to  
8 leave decoy voicemail messages – one at Post's office and the other on Krueger's phone. The  
9 decoy message stated that Post had taken a trip to Mexico City. TR 578-79. Defendants  
10 Krueger and Iribé forced Post to leave the message several times before they decided he  
11 sounded credible.

12 On August 21, 1998, Krueger went to the Intellisource office and was informed that  
13 Post had left a message there, stating that he had traveled to Mexico City. TR 598. Krueger  
14 also spoke with Iribé that day and Iribé informed Krueger that Post had been beaten but denied  
15 taking any money from Bailey. Iribé also told Krueger that Bailey was in Mexico and wanted  
16 to speak with Post herself. TR 600. Bailey told Iribé that she would not pay the final \$10,000  
17 unless she was able to talk with Post. TR 604.

18 On August 23, 1998, Bailey met with Krueger in San Diego and told him that she had  
19 seen Post and didn't like the fact that he looked beaten up. TR 606. Bailey also said she told  
20 Iribé not to kill Post but to build an underground house where he could live. TR 606. On  
21 August 24, 1998, Bailey returned to Mexico and, the next day, Iribé told Krueger that Post had  
22 been killed and that Bailey agreed with the decision to kill Post. On August 25, 1998 Krueger  
23 and Bailey met with two of Post's children and told them that he had gone to Mexico City. A  
24 few days later, Bailey told Krueger that she had to pay an additional \$10,000 as a disposal fee  
25 for Post's body. TR 618. Bailey said that she paid Iribé both the \$10,000 disposal fee as well  
26 as the additional \$10,000 still owing from the kidnapping. TR 618. Bailey also indicated that  
27 she paid two people \$100 each to make a video tape saying they had seen Post at the airport  
28 in Tijuana.

1 Following the kidnaping and killing of Post, Krueger and Bailey continued to have a  
2 business relationship. TR 631. By the end of 1998, the relationship between Krueger and  
3 Bailey deteriorated and reached the point where Krueger sought to foreclose on a trust deed  
4 in Bailey's name. Krueger had forged Bailey's signature to a trust deed in an attempt to collect  
5 money.

6 In June of 1999, Svetlana Ogorodnikova, a former spy for the Soviet Union, and her  
7 husband moved to Bailey's ranch as caretakers. Bailey moved back to the ranch and became  
8 friends with Ogorodnikova. Bailey related to Ogorodnikova the kidnaping of Post. Bailey  
9 also told her how she squeezed Post's fingers with pliers in order to try to get him to talk. TR  
10 1052. Bailey also told her that when Iribe told her they could not build the underground house,  
11 Bailey told him to "do what you have to do, kill." TR 1054.

12 After Bailey moved to Texas later in 1999, the FBI visited Bailey's ranch looking for  
13 her. Ogorodnikova told the FBI Agents about her conversations with Bailey regarding Post.  
14 The agents asked Ogorodnikova to tape record phone conversations with Bailey. During the  
15 taped conversations, Bailey asked about getting poison and hiring a hit man. TR 1072-73.

16 In December 1999, Bailey returned to San Diego to meet with an individual she  
17 believed to be an assassin. TR 1115. The "hit man" was actually an undercover FBI agent.  
18 Bailey told the hit man that she wanted to kill three people. She agreed to pay \$10,000 and  
19 provided the hit man with the identity and location of each of the three individuals. TR 313.

20 On July 17, 2002 the jury convicted Bailey on all counts. The jury did not reach a  
21 unanimous decision on whether or not the victim, Richard Post, had been murdered.

## 22 **Post-Conviction Proceedings**

23 Following trial, Bailey sought appointment of new counsel. On August 22, 2002,  
24 following a Faretta hearing, the court granted Bailey's motion for self-representation and  
25 appointed attorney Bernie Skomal, Esq. as standby counsel. Sentencing was originally  
26 scheduled for November 8, 2002. However, Bailey filed dozens of motions and requested  
27 multiple continuances which ultimately led to her sentencing on August 20, 2003. Bailey was  
28 sentenced to life imprisonment on Counts 1 and 2, to run concurrently, and ten years

1 imprisonment on Count 5, to run concurrent with Counts 1 and 2. At the time of sentencing  
 2 the court found, by un rebutted clear and convincing evidence that Richard Post had been  
 3 murdered.

4 On September 2, 2003, Bailey filed a Notice of Appeal. The Court of Appeals declined  
 5 to allow Bailey to represent herself on direct appeal and appointed Appellate Counsel.  
 6 Ultimately, on October 12, 2004 Bailey's convictions and sentence were affirmed.

7 In order to prosecute the present Motion, Bailey has filed more than 30 motions and  
 8 requests. Those motions included requests for change of venue, discovery, and recusal of the  
 9 undersigned. The motions were denied.

## 10 DISCUSSION

11 Bailey raises four grounds for relief. Each is discussed in turn.

### 12 **Ground One: Ineffective Assistance of Counsel and Conflict of Interest**

13 Bailey contends that she was deprived of her Fifth and Sixth Amendment rights when  
 14 trial counsel failed to adequately investigate and develop evidence to create a reasonable doubt  
 15 with the jury; failed to object to a tainted jury pool; failed to expose perjury of informants;  
 16 failed to notify the court that she fired her trial counsel in the middle of the trial; and failed to  
 17 allow her to testify. Bailey also contends that her counsel threatened to influence the  
 18 undersigned if she exposed the embezzlement of monies by her prior counsel. Finally, she  
 19 contends that appellate counsel was ineffective for failure to use unidentified evidence she  
 20 mailed to him to support her appeal.<sup>1</sup>

21 In order to prevail on an ineffective assistance of counsel claim, Bailey must show that  
 22 (1) trial counsel's representation fell below an objective standard of reasonableness and (2)  
 23 "defendant must show that there is a reasonable probability that, but for counsel's  
 24 unprofessional errors, the result of the proceedings would have been different. A reasonable  
 25 probability is a probability sufficient to undermine confidence in the outcome of the trial."

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26  
 27 <sup>1</sup> The court notes that Bailey fails to support her Motion with facts as required by Rule 2(b) of the Rules  
 28 Governing Section 2255 Proceedings. What record Bailey has submitted in support of her Motion consists of a General  
 Appendix to her reply brief, a 52 page affidavit, and several other documents. The court further notes that the self-serving  
 affidavit lacks evidentiary value. Virtually all the 213 points raised in the affidavit are not based on personal knowledge,  
 lack foundation, and constitute inadmissible hearsay.

1 Strickland v. Washington, 477 U.S. 668, 685-86 (1994). In evaluating counsel's performance,  
2 "there is a strong presumption that counsel's conduct falls within the wide range of reasonable  
3 professional assistance." Payton v. Woodward, 258 F.3d 905, 919 (9th Cir. 2001), cert.  
4 denied, 123 S.Ct. 1783 (2003). Bailey must also show that she was "actually prejudiced" by  
5 counsel's errors, the mere possibility of an error is not sufficient. Id.

6 In support of her claim of ineffective assistance of counsel, Bailey has submitted a 52-  
7 page document entitled "Affidavit for Motion to Vacate Pursuant to 28 U.S.C. § 2255  
8 identifying 213 points of error. (Docket No. 568). In large part Docket No. 568 identifies  
9 lines of questioning or the development of evidence that her counsel could have asked or  
10 developed at the time of trial, but did not. (Docket No. 568). Although convoluted and  
11 difficult to follow, the thrust of Bailey's story is that she is the victim of a conspiracy  
12 comprised of her attorneys, work associates, the F.B.I., the C.I.A., former Soviet spy Svetlana  
13 Ogorodnikova, and others who were out to get her. The individuals were motivated by money  
14 (based upon a financial evaluation of a black box biofrequency device she values at \$100  
15 million), loyalty (in the case of F.B.I. and C.I.A. operatives who were acquaintances or friends  
16 of Richard Post and have acted to protect him), and the desire to avoid being deported from  
17 the United States (in the case of former Russian spy Svetlana Ogorodnikova). In broad brush,  
18 Bailey alleges that she never intended to kidnap Richard Post. Rather, she only intended to  
19 have him arrested in Mexico for his involvement in the smuggling of Chinese weapons, aliens  
20 and drugs. While Bailey acknowledges that Richard Post was held by Iribe, she contends that  
21 he was not injured. While Bailey visited Richard Post at the torture site, she believes that he  
22 was not really injured. Rather, according to Bailey, the kidnaping/torture was a ruse in an  
23 attempt to extort money from her. She also alleges that Post was alive and living in Cancun  
24 three months after he was supposed to have been killed (in previously filed motions she  
25 claimed he was seen Europe). She also explains that the jury could not have convicted her on  
26 the murder for hire conviction because (1) third parties were trying to poison her and (2) the  
27 hit man she hired to kill Krueger entrapped her because, among other things, he failed to  
28 provide her with a "means of contacting him directly to cancel the deal (to kill Krueger and



1 others).” (Docket No. 458, ¶109). Bailey also speculates that the “pharmaceutical industry  
2 may be involved” in this case because her black box device “could eliminate many drugs from  
3 the market which each average \$3 billion a year in sales, per drug.” (Docket No. 458, ¶144).  
4 Because the black box device could eliminate the need for many pharmaceuticals, so the  
5 argument goes, the industry had an incentive to quash the marketing of such a device.

6 Bailey’s claims of ineffective assistance of counsel fail for several reasons. First and  
7 foremost, Bailey’s claims must be viewed through the lens of the overwhelming evidence of  
8 her guilt in the kidnaping and torture of Richard Post and her conduct in hiring an assassin to  
9 kill Krueger and others. The testimony presented at the time of trial – much of it in Bailey’s  
10 own words – exposed Bailey’s calculated, purposeful, and heinous crimes. Second, there is  
11 a “strong presumption that counsel’s conduct falls within the wide range of reasonable  
12 professional assistance.” Strickland, 466 U.S. 689. The 213 alleged trial errors fail to rebut  
13 the presumption that her trial counsel engaged in “sound trial strategy.” Id. Bailey claims that  
14 her counsel was ineffective because he failed to asked certain questions, failed to call  
15 witnesses, and failed to develop evidence that would create a reasonable doubt in the minds  
16 of the jury. These arguments fail to overcome the presumption of competence. The fact that  
17 her trial counsel was unable to create a reasonable doubt in the minds of the jury is not  
18 attributable to some perceived deficiency by counsel, but due to the development of an  
19 evidentiary record which overwhelmingly demonstrated Bailey’s callous, calculated  
20 participation in carrying out the kidnaping and torture of Richard Post as well as murder for  
21 hire. Third, many of the claims made by Bailey are simply fanciful. For example, she declares  
22 that she would testify that the Government knowingly used perjured testimony and withheld  
23 evidence; the Government failed to disclose that certain trial witnesses were purportedly  
24 granted immunity from prosecution and threatened other witnesses to withhold testimony in  
25 fear of criminal prosecution; and the Government interfered with her mail. (Docket No. 568,  
26 pp. 38-47, ¶¶1-90). Notably these arguments are unsupported by any evidence, lack  
27 foundation, and are not warranted by the trial record. The court will also directly address  
28 several of Bailey’s main arguments.



1 Bailey claims that she gave several boxes of documents to her former counsel, James  
2 Warner, and that he subsequently lost or destroyed them. She argues that the documents would  
3 have exculpated her. As with her other alleged errors, she fails to present any evidence to  
4 substantiate this argument. No one saw the boxes and there is no written transmittal letter from  
5 Bailey to Warner. She also contends that the jury was prevented from hearing evidence that  
6 Richard Post was alive and well in Cancun, Mexico. At the time of trial, she contends that Jay  
7 Walker would have testified that Skip Moschetti told Mr. Walker that Moschetti had seen him  
8 alive after his kidnaping and murder. Bailey was prevented from introducing this hearsay  
9 testimony. This is not ineffective assistance of counsel. The statement was inadmissible  
10 hearsay under the Federal Rules of Evidence.

11 Bailey also claims that trial counsel was ineffective for failing to withdraw as counsel  
12 of record and to permit her to testify. With respect to her claim that she desired to represent  
13 herself mid-way through trial, Bailey cannot demonstrate any prejudice because the court  
14 would not have granted any Faretta motion. Such a motion would have been denied as  
15 untimely. See Moore v. Calderon, 108 F.3d 261, 264 (9th Cir. 1997) (“a request [for self-  
16 representation] is timely if made before the jury is empaneled”).

17 Bailey also claims her counsel was ineffective for failing to permit her to testify. At  
18 some unidentified time during the trial, Bailey claims that she informed trial counsel that she  
19 desired to testify. While a defendant has a right to testify in her own defense, see United States  
20 v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir. 1999), cert. denied, 528 U.S. 989 (1999), that  
21 right may be waived either implicitly or explicitly. “A defendant is presumed to assent to [her]  
22 attorney’s tactical decision not to have [her] testify.” Id. However, “[w]hen a defendant  
23 remains silent in the face of [her] attorney’s decision not to call [her] as a witness, [s]he waives  
24 the right to testify.” Here, Bailey did not inform the court of her purported desire to testify  
25 until after the jury returned guilty verdicts. Accordingly, Bailey fails to rebut the presumption  
26 that trial counsel’s tactical decision not to have her testify was ineffective.

27 Bailey also claims that her prior counsel, James Warner, had an actual conflict of  
28 interest because, among other things, he was involved in the management of her business.

1 Bailey cannot demonstrate any prejudice at the time of trial because Mr. Warner did not  
2 represent her at the time of trial.

3 Bailey also claims that her trial counsel, Mr. DeMassa, had an actual conflict of interest  
4 because he had a friendship with James Warner and that Warner and DeMassa threatened to  
5 influence the judge to give Bailey life in prison if she accused them of misappropriating her  
6 funds or businesses. This argument is not supported by any evidence and, given the apparent  
7 fanciful nature of the claim, Bailey must support this claim with some evidence. While an  
8 actual conflict of interest may be grounds to grant relief under 28 U.S.C. §2255, Bailey must  
9 go beyond a self-serving declaration to create a viable issue. Furthermore, although couched  
10 as an ineffective assistance of counsel claim, it appears that the standard of review of this claim  
11 is the “cause and actual prejudice” standard enunciated in Davis v. United States, 411 U.S. 233  
12 (1973). Bailey fails to show cause why this argument was not raised at the time of trial or to  
13 demonstrate any prejudice. Consequently, this argument necessarily fails.

14 Bailey also alleges that appellate “counsel was ineffective for failing to use evidence  
15 mailed to him to support” her claims. (Motion at p.6). Bailey has not addressed this argument  
16 in sufficient detail, nor provided any evidence to support her claim that appellate counsel  
17 possessed exculpatory evidence. Therefore Bailey fails to meet her burden on this argument.

18 In sum, Bailey was not provided ineffective assistance of counsel and the court denies  
19 Ground One in its entirety.

20 **Ground Two: The Booker Claim and Judicial Bias**

21 Bailey claims that her Fifth and Sixth Amendment rights were violated under United  
22 States v. Booker, 543 U.S. 220 (2005) when the court found that the victim Richard Post had  
23 been killed; the court demonstrated judicial bias; the record was not sufficiently developed for  
24 appeal; and the jury pool was biased against her by “the media blitz” surrounding her trial.  
25 (Motion at p.6). The court notes that the standard of review for many of the claims to which  
26 no contemporaneous objection was made at trial is the cause and prejudice standard. See  
27 Davis, 411 U.S. 233. Each argument is discussed in turn.

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1 The Government contends that Bailey may not raise a Booker claim because her appeal  
2 became final on November 3, 2004, prior to the decision in Booker. See United States v. Cruz,  
3 423 F.3d 1119 (9th Cir. 2005). While judgment was entered by the Ninth Circuit on  
4 November 3, 2004, the decision did not become final until the 90 day  
5 period for filing a petition for writ of certiorari in the Supreme Court expired. See Clay v.  
6 Untied States, 537 U.S. 522, 525 (2003); Al-Harbi v. I.N.S., 284 F.3d 1080 (9th Cir. 2002).  
7 Accordingly, Booker, decided on January 12, 2005, applies to the present case because the  
8 judgment did not become final until about February 3, 2005.

9 Even though Booker applies to the present case, Bailey cannot demonstrate any  
10 prejudice by the court's findings and resulting sentence because an objective reading of this  
11 court's sentencing allocution discloses that the court considered relevant factors and would  
12 have imposed the same sentence post Booker. This is true even (1) in the absence of the  
13 court's finding that Richard Post was murdered and (2) if the court had understood the  
14 sentencing guidelines to be advisory.

15 As set forth at the time of sentencing, Counts 1 and 2 were grouped under §2D1.2.  
16 Instruction §2X1.1 states that the base offense level for conspiracy is the base offense level  
17 from the guideline for the substantive offense, plus any adjustments from such guideline.  
18 §2X1.1. The court found the appropriate guideline to be §2A1.1 – the first degree murder  
19 guideline. As in United States v. Gamez, 301 F.3d 1138 (9th Cir. 2002), the court concluded  
20 that Apprendi v. New Jersey, 530 U.S. 466 (2000) did not require the issue of Post's murder  
21 to be placed before the jury because an "affirmative ruling on that issue would not result in a  
22 sentence beyond the prescribed statutory maximum of life in prison for these counts." (August  
23 20, 2003 TR, p. 72:10-12). The court further found, by clear and convincing evidence, that  
24 Post was murdered as a foreseeable consequence of the conspiracy to kidnap, torture, and  
25 murder. Consequently the court determined that 43 represented the appropriate base offense  
26 level. This court then upwardly adjusted the base offense level for Bailey's aggravated role  
27 and denied all downward departure requests made by Bailey. Thereafter the court imposed the  
28 statutory maximum life sentence. See 18 U.S.C. §§ 956(a)(2)(A) and 1201(a).

1 In Booker, the Supreme Court did not eliminate judicial fact-finding. Rather, to avoid  
2 any Sixth Amendment issue, the Supreme Court held that the sentencing guidelines are  
3 “effectively advisory.” 543 U.S. at 245. In light of Booker and United States v. Ameline, 409  
4 F.3d 1073 (9th Cir. 2005), the record clearly demonstrates this court’s intention to impose a  
5 life sentence for reasons predicated upon the relevant sentencing provisions of 18 U.S.C.  
6 §3553(a).

7 At the time of sentencing, this court detailed the nature and circumstances of Bailey’s  
8 participation as well as her aggravated role. (August 20, 2003 TR, pp. 73-79). In effect,  
9 Bailey was the engine and keystone behind the plot to kidnap and torture Richard Post. She  
10 planned the mechanics of the kidnaping, provided substantial money to implement the kidnap  
11 plan, and paid Iribe for the kidnaping and disposal of Richard Post’s body. Bailey lured  
12 Richard Post to Mexico; and the kidnaping occurred in her presence. When, following initial  
13 torturing, Richard Post failed to provide any information about the missing money, Bailey  
14 visited him at the torture site in a further effort to extract information from him.

15 When Bailey was informed that Richard Post could not be held any longer, and he  
16 denied under torture to having embezzled any money from Bailey, she paid additional money  
17 to have Iribe kill Richard Post and dispose of the body. Bailey herself provided corroborating  
18 evidence in the form of whispered conversations to Ms. Ogorodnikova and later to Agent  
19 McKean detailing the kidnaping of Richard Post as well as the methods of torture and Richard  
20 Post’s ultimate demise, including a reference that Bailey personally authorized the killing of  
21 Richard Post. Further, Bailey engaged in a subterfuge to deceive Richard Post’s family into  
22 believing that he had purposely disappeared. Richard Post was obligated, by means of physical  
23 force, to leave messages at his place of business indicating that he had left town. Bailey also  
24 purported to offer a reward for information about Mr. Post’s location, at the same time she  
25 knew he was kidnaped, tortured, and killed.

26 When it came time in this court’s sentencing allocution to address whether the ten year  
27 sentence for Count 5 would be imposed consecutively or concurrently to the life term for

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1 Counts 1 and 2, this court directly spoke to the need to protect the public from Bailey based  
2 on her relevant history:

3 As to the matter of the Court imposing custody on Count 5 consecutive  
4 to the life terms imposed for Counts 1 and 2, I can only say that protection of the  
5 public is paramount in this case. Ms. Bailey has proven herself to be cold-  
6 blooded in her impulses to kill or have killed those whom she perceives to be a  
7 threat to her, real or imagined, as a result of her inflated sense of self-worth, and  
8 I think it's very important to keep Ms. Bailey in custody for as long as possible.  
9 I don't think any of those impulses have been in any way allayed. Ms. Bailey  
10 has expressed no contrition, no remorse, no acknowledgement (sic) of any  
11 wrongdoing, and perhaps that's the most unsettling part of all this.

12 During the course of this trial, it did become clear to the Court that Ms.  
13 Bailey has conflated her desire to serve humanity with her desire to murder  
14 those with whom she [has] perceived as an obstacle to application of her  
15 personal philosophy and code, and that's why I think Ms. Bailey poses a grave  
16 and serious danger to society if left to her own devices in any form.

17 (August 20, 2003 TR, pp. 87:14-88:7).

18 Under the circumstances of this case, a life sentence is entirely appropriate and  
19 consistent with Federal sentencing law both prior to and after Booker. Bailey's life sentence  
20 addresses the seriousness of her conduct and serves to protect the public.

21 Bailey also argues that her constitutional rights were violated by a tainted jury pool,  
22 judicial bias, and insufficiently developed record on appeal. With respect to the jury-related  
23 arguments (news articles regarding the case tainted the jury pool, high percentage of jurors  
24 with ties to law enforcement, and a juror who was a potential witness in an unrelated criminal  
25 case in state court) Bailey fails to show cause why the arguments were not raised at the time  
26 of trial or to show any prejudice or to identify how these supposed facts or arguments impacted  
27 her Fifth and Sixth Amendment rights to a fair trial. Moreover, during jury selection, all jurors  
28 were asked whether they had heard about this case or had any information concerning the case.  
All jurors provided negative responses. (June 18, 2003 TR, p.55:3-7). Consequently, these  
arguments are denied.

29 Bailey also argues that the court demonstrated judicial bias and failed to permit her to  
30 develop a record on appeal. With respect to judicial bias, this court has addressed Bailey's  
31 previous motions seeking recusal and the court incorporates those orders as if fully set forth  
32 herein. The factual basis for this claim, in part, is set forth in Bailey's reply brief wherein she

1 represents that the “court stated that Dr. Shelton’s testimony was totally discredited. (Tab A,  
 2 p.54). Dr. Shelton testified that he identified a poisonous level of cyanide in Bailey.” (Reply  
 3 at p.8). Bailey misrepresents the record and fails to identify the context of the court’s  
 4 comments. In addressing Bailey’s claim that she was provided with ineffective assistance of  
 5 counsel, the court addressed the vigorous defense presented by trial counsel, Mr. DeMassa.  
 6 The court noted that Mr. DeMassa provided an effective cross-examination of principal  
 7 witnesses for the government and then stated that Mr. DeMassa called Dr. Shelton “on the  
 8 question of whether or not Ms. Bailey had been subject to poisoning, environmental or  
 9 otherwise, and [the court believed that Mr. DeMassa] conducted a very effective direct  
 10 examination of Dr. Shelton.” (August 20, 2003 TR 54:1013). The court then went on to note  
 11 that it wasn’t until cross-examination that it was revealed that “the blood work of Ms. Bailey  
 12 largely fell into normal ranges and that Dr. Shelton could make no opinion, could state no  
 13 opinion with respect to whatever Ms. Bailey’s status might have been in December of 1999,  
 14 the time related to the fifth count.” (TR 54:15-20).

15 The court did not state that Dr. Shelton’s testimony was totally discredited. Rather, the  
 16 court stated, to the effect, that Mr. DeMassa presented an effective case on direct but that, on  
 17 cross-examination, it was revealed that the blood tests relied upon by Dr. Shelton were not  
 18 contemporaneous with the point in time that Bailey sought to hire an assassin to murder  
 19 Krueger and others.<sup>2</sup> In other words, Bailey’s example of bias is not demonstrated from the  
 20 record.

21 In sum, the court denies Ground Two in its entirety.

### 22 **Ground Three: Illegal Mail Tampering**

23 Bailey alleges that her Fifth and Sixth Amendment rights were violated when her mail  
 24 was tampered with “at critical times.” (Motion at p.6). Bailey identifies that briefs and  
 25 exhibits she provided to the Ninth Circuit were tampered with and/or disappeared. The court  
 26 notes that this is not a proper subject of a 28 U.S.C. §2255 motion as it does not challenge her  
 27

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28 <sup>2</sup> The court notes that virtually all of Bailey’s perceived constitutional violations are not based upon any  
 evidentiary showing but, rather, upon strained and unsupported conclusory statements.

1 conviction or sentence. Even if some form of “mail tampering” did occur, the court notes that  
2 such “tampering” does not appear to have hindered Bailey’s access to the courts as she has  
3 filed with this court in excess of 30 motions this year alone. Accordingly, the court denies this  
4 claim as grounds for relief.

5 **Ground Four: Obstacles to Perfecting Appeal**

6 Bailey alleges her Fifth and Sixth Amendment rights were violated when she  
7 encountered obstacles to perfecting the record on appeal by filing exhibits to support her  
8 claims. Those obstacles include this court’s denial for the issuance of subpoenas post-trial,  
9 evidence withheld by prior counsel, denial of FOIA requests post-trial, her confinement in  
10 administrative segregation, a broken inmate copier for four months, limitations on the use of  
11 the copier, closing the law library, illness due to lack of heat, and this court’s denial of funds  
12 to copy documents. As with the previous claim, the majority of these grounds for relief are not  
13 a proper subject for 28 U.S.C. §2255 relief as they do not challenge her conviction or sentence.  
14 Notwithstanding, the court will respond to several of the arguments.

15 With respect to the request for issuance of post-trial subpoenas, Bailey fails to provide  
16 any authority that a convicted individual has the right to engage in post-trial discovery absent  
17 a showing of substantial or compelling need, something Bailey fails to do. With respect to her  
18 allegation that the court has denied her request for copying costs, the court notes that it has in  
19 fact repeatedly indicated its willingness to grant such funds upon “an initial threshold showing  
20 that the documents are probative and support her claims. A general claim that ‘the quantity  
21 needed to prove each of her claims is 4,500 pages’ [] is insufficient to warrant the expenditure  
22 of CJA funds.” (Docket No. 601, Order Re: Filings of March 27, 2006; March 28, 2006;  
23 March 30, 2006, and April 3, 2006 at p.4:8-10). Accordingly, the court denies relief on Ground  
24 Four.

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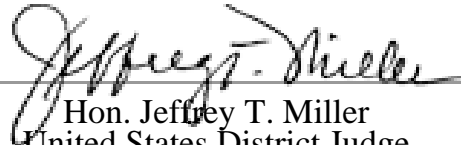
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1 In sum, the court denies Bailey's Motion in its entirety. All other pending motions are  
2 denied as moot.

3 **IT IS SO ORDERED.**

4 DATED: December 8, 2006

5   
6 Hon. Jeffrey T. Miller  
United States District Judge

7 cc: All Parties

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